

**IN THE  
SUPREME COURT OF OHIO**

STATE OF OHIO

CASE NO 2015-0473

Plaintiff-Appellant

ON APPEAL FROM CUYAHOGA  
COUNTY COURT OF APPEALS,  
EIGHTH APPELLATE DISTRICT

v.

JERMAIN THOMAS

COURT OF APPEALS CASE NO. 101202

Defendant-Appellee

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## **INTRODUCTION**

The State of Ohio asks this Court to reverse the decision of the Eighth District Court of Appeals, which found the sentence imposed upon Jermain Thomas to be void. The decision in *State v. Thomas*, 8<sup>th</sup> Dist. Cuyahoga No. 101202, 2015-Ohio-415 followed the Eighth District's own holding in *State v. Jackson*, 8<sup>th</sup> Dist. Cuyahoga No. 100877, 2014-Ohio-5137, *appeal not accepted*, 142 Ohio St. 3d 1465, 2015-Ohio-1896, and has become the rule of law in Cuyahoga County. The Eighth District's decision must be reversed because it ignores Ohio law and permits a repeal by implication where the General Assembly has not expressly signaled its intent to repeal Section 5 of Am.Sub.S.B. No. 2 ("S.B. 2"), 146 Ohio Laws, Part IV, 7136.

## **STATEMENT OF THE CASE**

Jermain Thomas was indicted in Cuyahoga County Case No. CR-575711-A for sexual offenses committed on June 28, 1993. The indictment charged Thomas in a four count indictment that included three counts of rape, in violation of R.C. 2907.02(A)(2), and one count of kidnapping, in violation of R.C. 2905.01(A)(4). Each count of rape alleged a separate sexual act. After the discovery process, the case proceeded to a jury trial.

On February 28, 2014, the jury returned a verdict of guilty with a firearm specification under count 1 of the indictment as well as a verdict of guilty on kidnapping with a firearm specification. On March 24, 2014, the trial court imposed an indefinite prison sentence of 8 – 25 years on each count, consecutive to 3 years imposed on the firearm specification for a total indefinite prison term of 11 – 25 years<sup>1</sup>.

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<sup>1</sup> At the time of the offense, available felony sentencing were codified under R.C. 2929.11, felony prison terms are codified under R.C. 2929.14 since S.B. 2.

Thomas then appealed his conviction and sentence to the Eighth District Court of Appeals. Thomas raised five assignments of error in which he argued: (1) that his case should have been dismissed for pre-indictment delay; (2) that the trial court erred in admitting hearsay statements; (3) that the trial court erred in not admitting certain evidence; (4) that the trial court erred in refusing to grant a mistrial; and (5) that, “the trial court erred in sentencing Defendant to a term of imprisonment of eight to twenty-five years, contrary to the provisions of R.C. 1.58(B).” *Thomas’s brief filed in 8<sup>th</sup> Dist. Cuyahoga No. 101202, Assignment of Error Five*. Thomas argued that R.C. 1.58(B) made applicable to him, the H.B. 86 sentencing provisions. In support of his argument, Thomas relied upon the language of Section 3 of H.B. 86. In addition, Thomas relied upon this Court’s decision in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612 and *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641.

By the time the Eighth District rendered its opinion in *State v. Thomas*, 8<sup>th</sup> Dist. Cuyahoga No. 101202, 2015-Ohio-415, it had already decided *State v. Jackson*, 8<sup>th</sup> Dist. Cuyahoga No. 100877, 2014-Ohio-5137, *appeal not accepted*, 142 Ohio St. 3d 1465, 2015-Ohio-1896, *State v. Steele*, 8<sup>th</sup> Cuyahoga Nos. 101139-101140, 2014-Ohio-5431, *appeal not accepted*, 102 Ohio St. 3d 1458, 2004-Ohio-2569, and *State v. Girts*, 8<sup>th</sup> Dist. Cuyahoga No. 101075, 2014-Ohio-5545, *appeal not accepted*, 143 Ohio St. 3d 1441, 2015-Ohio-3427. The Eighth District Court of Appeals reversed in this case declaring that the sentence imposed by the trial court was void *ab initio* and that the indefinite sentences were void and had to be vacated. *Thomas*, ¶49.

### **STATEMENT OF THE FACTS**

On the night of June 28, 1993, into the early morning hours of the June 29<sup>th</sup>, A.W. decided to walk to her cousin’s house. *Tr. 601*. She exited her house and walked towards Hilgert. *Tr. 546*. It was dark out but not pitch black. *Tr. 613*. As she arrived at the stop sign at East 97<sup>th</sup> and Dickens

in Cleveland, Ohio, Thomas approached her from her left. *Tr. 547*. That was the first moment she noticed Thomas. *Tr. 634*. Thomas turned A.W. and forced her down East 97<sup>th</sup> towards Hilgert. *Tr. 634*. As she walked, Thomas stayed behind her to the side and was forcing something into her back. *Tr. 546-547*.

Thomas forced A.W. up a driveway and behind a house on East 97<sup>th</sup>. *Tr. 634*. Next to the house was an empty field. *Tr. 644*. Once behind the house, A.W. could see that what Thomas had stuck in her back during the walk was in fact a gun. *Tr. 547*. He then forced her to her knees and bent away from him. *Tr. 550-551*. The only light A.W. could see at this time was through the trees while she was on her knees, in the dirt, with defendant penetrating her. *Tr. 647*. At trial, the victim could only recall vaginal penetration and no other penetration. *Tr. 551*.

After being raped, A.W. ran through the field and home. *Tr. 552*. She did not know which direction appellant ran. *Tr. 552*. Eventually A.W. made contact with a friend and called police. *Tr. 630*. Police arrived and A.W. was taken to the hospital. *Tr. 554*. A rape kit was collected. *Tr. 477*. There were no further leads on the case. *Tr. 716*.

In 2006, the Ohio Bureau of Criminal Investigation tested the rape kit in relation to A.W. from 1993. *Tr. 730*. They were able to find seminal fluid in the vaginal swabs. *Tr. 733*. The vaginal swabs showed DNA from the victim, Thomas and a third unknown male. *Tr. 747*. Thomas was the major contributor at a likelihood of one quintillion, 223 quadrillion to 1. *Tr. 748*. At that time, those results were sent to a detective in the Cleveland Sex Crimes Unit. *Tr. 811*. The detective attempted to contact A.W. at a number of addresses that she believed might be associated with A.W.. *Tr. 811 – 816*. While never meeting A.W. face to face, the detective did receive a call from A.W. stating that she did not want to prosecute at that time. *Tr. 816*. The case was subsequently closed. *Tr. 818*.

In 2013, an investigator with the Cuyahoga County Prosecutor's Office made contact with A.W. *Tr.* 758. The investigator explained that there was a lead in the case and the office would pursue the lead. *Tr.* 759. Over the course of the following months, the investigator discussed the incident face to face with A.W. *Tr.* 760. The investigator presented a photographic lineup to Walton to determine if she had consensual sex with appellant. *Tr.* 760. A.W. was not able to pick out Thomas as a consensual sex partner. *Tr.* 760.

In addition to the record filed in this case, the Eighth District Court of Appeals summarized the facts of this case in *Thomas*, 8<sup>th</sup> Dist. Cuyahoga No. 101202, 2015-Ohio-415, ¶ 2-6.

## **LAW AND ARGUMENT**

### **PROPOSITION OF LAW: A DEFENDANT WHO COMMITS AN OFFENSE PRIOR TO JULY 1, 1996 IS SUBJECT TO LAW IN EFFECT AT THE TIME OF THE OFFENSE AND NOT SUBJECT TO SENTENCING PROVISIONS OF S.B. 2 EFFECTIVE JULY 1, 1996 AND H.B. 86 EFFECTIVE SEPTEMBER 30, 2011**

#### **A. Background**

In *State v. Rush*, 83 Ohio St. 3d 53, 697 N.E.2d 634 (1998), this Court considered defendants claims that R.C. 1.58(B) made applicable to them what they perceived as favorable changes under the S.B. 2 law. S.B. 2 had made significant changes to Ohio's criminal code, modifying classification of criminal offenses, felony classifications, and sentences, as well as many other significant changes. *See* 146 Ohio Laws, Part IV, 7136, Legislative Service Commission Analysis of Sub.S.B. No. 2, Parts II and V (1995). This Court held that amended sentencing provisions of S.B. 2 only applied to those crimes committed on or after July 1, 1996. *Rush*, paragraph two of the syllabus. The decision acknowledged the wall established by the General Assembly to separate the sentences available to offenders who commit offenses prior to July 1, 1996 and offenders who would be subject to the new S.B. 2 scheme.

Since 1996, R.C. 2929.14, proscribes the available sentences for felonies under the S.B. 2 scheme, has been amended numerous times. The significant amendment at issue in this case is Am.Sub.H.B. No. 86 (“H.B. 86”), effective September 30, 2011. This provision in part changed the sentences available under the felony sentencing scheme established in S.B. 2 and change the classification of certain crimes under the same S.B. 2 sentencing scheme.

The Eighth District Court of Appeals, in a long line of cases, has determined that the wall that separated two very different sentence schemes, should be taken down by implication. This Court’s decision in *Rush*, 83 Ohio St.3d 53, 697 N.E.2d 634 recognized a clear divide between those offenders who committed their offenses prior to July 1, 1996 and those who committed their offenses after July 1, 1996. This Court held:

Because the General Assembly expressly stated that the amended sentencing provisions of Am.Sub.S.B. No. 2 are applicable only to those crimes committed on or after its effective date, R.C. 1.58(B) is inapplicable. The amended sentencing provisions of Am.Sub. S.B. No. 2 apply only to those crimes committed on or after July 1, 1996.

*Rush*, 83 Ohio St.3d 53, paragraph two of the syllabus.

In *State v. Jackson*, 8<sup>th</sup> Dist. Cuyahoga No. 100877, 2014-Ohio-5137, the Eighth District addressed the legal issue of whether a first degree felony offense committed prior to July 1, 1996, should be sentenced under H.B. 86, which did not become effective until September 30, 2011. *Id.* at ¶ 29. The Eighth District held that the defendant should be sentenced under current law as opposed to the law in effect at the time of the offense, as the current law constituted a reduction in sentence. *Thomas*, ¶ 49.

In *State v. Jackson*, 8<sup>th</sup> Dist. Cuyahoga No. 100877, 2014-Ohio-5137, the Eighth District acknowledged that in S.B. 2, the General Assembly specifically required all defendants who committed crimes prior to July 1, 1996 to be “sentenced under the law in existence at the time of

the offense, notwithstanding division (B) of section 1.58 of the Revised Code.” *Id.* at ¶ 30, citations omitted. However, the Eighth District then considered the uncodified language in H.B. 86 and noted that “H.B. 86 does not include [the same] exclusionary language” regarding section 1.58 of the Revised Code. *Id.* at ¶ 31. The Eighth District further emphasized the fact that in “Sections 3 and 4 of [H.B. 86], the General Assembly expressly provid[ed] that certain specified offenses and certain sentencing provisions are subject to H.B. 86 sentencing amendments even though the subject offenses were committed prior to its effective date.” *Id.* Based on the above, the Eighth District held that the defendant in *Jackson* was “entitled to the more lenient sentencing provisions of H.B. 86 by virtue of R.C. 1.58(B).” *Id.* at ¶ 37. The reasoning was the basis for the Eighth District’s decision in *State v. Thomas*, 8<sup>th</sup> Dist. Cuyahoga No. 101202, 2015-Ohio-415 as well as many other cases. *See State v. Jenkins*, 8<sup>th</sup> Dist. Cuyahoga No. 102462, 2015-Ohio-4583, *State v. Burton*, 8<sup>th</sup> Dist. Cuyahoga No. 102378, 2015-Ohio-4494, *State v. Jackson*, 8<sup>th</sup> Dist. Cuyahoga No. 102271, 2015-Ohio-4490, *State v. Frost*, 8<sup>th</sup> Dist. Cuyahoga No. 102376, 2015-Ohio-4493, *State v. Bell*, 8<sup>th</sup> Dist. Cuyahoga No. 102141, 2015-Ohio-4178, *State v. Owens*, 8<sup>th</sup> Dist. Cuyahoga No. 102276, 2015-Ohio-3881, *State v. Wheeler*, 8<sup>th</sup> Dist. Cuyahoga No. 102375, 2015-Ohio-3768, *State v. Stearns*, 8<sup>th</sup> Dist. Cuyahoga No. 102463, 2015-Ohio-3239, *State v. Hill*, 8<sup>th</sup> Dist. Cuyahoga No. 101633, 2015-Ohio-2389, *State v. Bryan*, 8<sup>th</sup> Dist. Cuyahoga No. 101209, 2015-Ohio-1635, appeal accepted for review, 2015-Ohio-1635, *State v. Kent*, 8<sup>th</sup> Dist. Cuyahoga No. 101853, 2015-Ohio-1546, accepted for review, 2015-Ohio-4947, *State v. Girts*, 8<sup>th</sup> Dist. Cuyahoga No. 101075, 2014-Ohio-5545, and *State v. Steele*, 8<sup>th</sup> Dist. Cuyahoga No. 101139, 2014-Ohio-5431.

The concurring opinions in *Bryan*, 8<sup>th</sup> Dist. Cuyahoga No. 101209, 2015-Ohio-1635 and *Hill*, 8<sup>th</sup> Dist. Cuyahoga No. 101633, 2015-Ohio-2389 succinctly summarizes the State’s position and argument in this case and addresses three points which are central to the State’s argument: (1)

that no provision of H.B. 86 expressly repealed the uncodified law provisions of S.B. 2; (2) that repeals by implication are disfavored; and (3) cases relied upon by Thomas and similar defendant are distinguishable from the issue in this case.

The State has appealed the decisions of the Eighth District because the argument that H.B. 86 represents a favorable sentencing scheme to defendants such as Thomas is the same argument raised in *Rush*. In *Rush*, the defendants sought to have the S.B. 2 scheme applied to them. H.B. 86 was an amendment to the S.B. 2 sentencing scheme. Thomas, like other defendants in Cuyahoga County, now seek to have the amended S.B. 2 sentencing scheme, i.e. H.B. 86 applied to them. The General Assembly signaled its intent to limit the application of S.B. 2 and this limitation was not removed through H.B. 86.

**B. The uncodified law of S.B. 2 limits its application and subjects offenders who commit their offense prior to July 1, 1996 to the law in effect at the time of their offense. This uncodified law was not repealed by H.B. 86.**

A defendant who commits an offense prior to July 1, 1996 is subject to the law in effect at the time of the offense. This rule is contained in Section 5 of S.B. 2, which is uncodified law. Statements included in legislation but not placed in the code are “uncodified law,” and are part of the law in Ohio. See *Maynard v. Eaton Corporation*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, ¶7. Uncodified law is a law of a special nature that has a limited duration or operations and is not assigned a permanent Ohio Revised Code section number. Uncodified law does not appear in the statute in codified form but is filed with the Secretary of State. *Eaton Corporation*, ¶ 7.

The original, unamended form of Section 5 of S.B. 2 reads as follows:

Section 5. The provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and to a person upon whom a court, on or after that date and in

accordance with the law in existence prior to that date, imposed a term of imprisonment for an offense that was committed prior to that date.

The provisions of the Revised Code in existence on and after July 1, 1996, apply to a person who commits an offense on or after that date.

Section 5 of S.B. 2 (146 Ohio Laws, Part VI, 7810)

This was later redundantly amended through Section 3 of S.B. 269, 146 Ohio Laws, Part VI, 11099 to emphasize that S.B. 2's provisions apply only to crimes committed on or after July 1, 1996 "notwithstanding division (B) of section 1.58 of the Revised Code." *State v. Rush*, 83 Ohio St.3d 53, 57. *Rush* and Section 5 of S.B. 2 make clear that R.C. 1.58(B) does not apply to a person who committed their offense prior to July 1, 1996 and sentenced after that date.

Critical to this case is the import and effect of the uncodified law provisions. "Acts of the General Assembly (and the codified and uncodified statutes they contain) are compiled and published in Ohio's 'session laws,' the *Laws of Ohio*." A Guidebook for Ohio Legislators, *Appendix C*, pg. 169-170, <http://www.lsc.state.oh.us/guidebook/guidebook13.pdf> (accessed December 14, 2015). Further, the Guidebook for Ohio Legislators explains how uncodified law is written, is part of Ohio law that is filed with the Secretary of State and when amended, changes in the text appear stricken through or underlined just as in codified law. A Guidebook for Ohio Legislators, pg. 67-68. There would be nothing within the language of H.B. 86 to suggest an amendment or repeal of Section 5 of S.B. 2.

H.B. 86 was enacted by the 129<sup>th</sup> General Assembly and is published with the Secretary of State. Laws of Ohio, 129<sup>th</sup> General Assembly, <http://www.sos.state.oh.us/SOS/historicaldocuments/LawsOfOhio/historical/129th.aspx> (accessed December 14, 2015). Also available through the Secretary of State are uncodified laws affected by the acts of the 129<sup>th</sup> General Assembly. This publication does not include Section 5 of S.B. 2

of the 121<sup>st</sup> General Assembly as being affected by any legislative act of the 129<sup>th</sup> General Assembly. Nor is there any indication that Am. Sub. H.B. 86 affected any uncodified law provisions. *See* Uncodified Laws Affected, <http://www.sos.state.oh.us/sos/upload/laws/129/11-uncodified-affected.pdf> (accessed December 14, 2015). For example, if one were to look up Section 9 of S.B. 171 [http://archives.legislature.state.oh.us/bills.cfm?ID=129\\_SB\\_171](http://archives.legislature.state.oh.us/bills.cfm?ID=129_SB_171), (accessed December 18, 2015), one would confirm that the information on the Secretary of State's website is correct, that provisions of the 124<sup>th</sup> General Assembly were repealed through S.B. 171, and these provisions were repealed through the General Assembly's express language of repeal. No express language in H.B. 86 repeals or amends Section 5 of 1995 S.B. 2, and as a result that uncodified provision is still the law in Ohio and must be followed.

The Eighth District did not look for express language repealing Section 5 of S.B. 2. Instead, it found fatal to the State's argument, that the language found in Section 5 of S.B. 2 was not contained in Section of H.B. 86. In its analysis, the Eighth District interpreted Section 4 of H.B. 86 to make H.B. 86 retroactively applicable to offenses committed prior to July 1, 1996. Section 4 of H.B. 86 states:

SECTION 4. The amendments to sections 926.99, 1333.99, 1707.99, 1716.99, 2909.03, 2909.05, 2909.11, 2913.02, 2913.03, 2913.04, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.40, 2913.401, 2913.42, 2913.421, 2913.43, 2913.45, 2913.46, 2913.47, 2913.48, 2913.49, 2913.51, 2913.61, 2915.05, 2917.21, 2917.31, 2917.32, 2921.13, 2921.41, 2923.31, and 2981.07, division (B) of section 2929.13, and division (A) of section 2929.14 of the Revised Code that are made in this act apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.

Section 4 of H.B. 86 provides that the amendments "apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments

applicable.” Thus, H.B. 86 applies in only two circumstances: (1) where an offense is committed on or after September 30, 2011 or (2) where a person is sentenced after September 30, 2011 **and** R.C. 1.58 applies (Emphasis added). Neither condition is met with regard to offenders who committed their offenses prior to July 1, 1996 due to the date of the offense and due to S.B. 2’s limitation of R.C. 1.58’s applicability.

Even though an offender such as Thomas is sentenced after September 30, 2011, R.C. 1.58(B) has not been made applicable to him due to the limiting provisions contained in the uncodified law of S.B. 2. *Rush*, 83 Ohio St.3d 53, 57. The Eighth District’s holding is based upon a flawed analysis of Am. Sub. H.B. 86. The Eighth District incorrectly held that the General Assembly was required to include an express provision in H.B. 86 that made H.B. 86 not applicable to offense committed prior to July 1, 1996. However, the absence of such language in H.B. 86 does not expressly repeal Section 5 of S.B. 2. In essence, the Eighth District Court of Appeals ignores the significance of uncodified law and has created a rule as to how the General Assembly should maintain uncodified law. The rule also ignores the Ohio Constitution, which provides that a section amended must repeal the former. Article II, Section 15 of the Ohio Constitution.

**C. This Court’s decision in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460 and *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072 should be distinguished.**

To the extent that the Appellee would rely upon this Court’s recent decisions in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612 and *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641, both cases are distinguishable and do not address the issues raised by the State’s proposition of law.

In *Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, this Court addressed an issue raised by a conflict certified by the Ninth District Court of Appeals, specifically “whether the defendant may benefit from the decrease in classification and penalty of an offense enacted by the General

Assembly that becomes effective after the commission of the offense but before sentencing on that offense.” *Taylor*, ¶ 1. This Court answered the certified question in the affirmative, holding that the General Assembly intended to confer a benefit of a decreased theft offense classification. However, in the context of the case, Taylor stole \$550 on July 23, 2011 and the issue was whether Taylor should be sentenced for a fifth-degree felony, which was in effect at the time of Taylor’s offense or whether he should have been sentenced for a misdemeanor theft offense.

In *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, this Court addressed whether the General Assembly’s elimination of the cocaine/crack-cocaine distinctions in H.B. 86 applied to an offender who possessed crack-cocaine prior to the effective date of H.B. 86. This Court held that the defendant was subject to H.B. 86. In doing so, this Court cited to express provisions of H.B. 86 that demonstrated the General Assembly’s intent that Limoli receive the benefit of the reduced penalties of H.B. 86 regarding possession of crack cocaine. This Court’s analysis on the specific issue of law was guided by Section 3 of H.B. 86, which specifically provided that the amendments to R.C. 2925.11 to a person to whom R.C. 1.58(B) made the amendment applicable. *Limoli*, ¶ 12, 14.

This Court recognized in *Taylor* that, “an offender may not benefit from a reduction in the penalty or punishment when the legislature expressly provides that the amended sentencing provisions apply only to those committed on or after the effective date of the enactment.” *Taylor*, ¶ 13, citing *State v. Rush*, 83 Ohio St. 3d 53, 697 N.E.2d 634 (1998) paragraph two of the syllabus. In doing so, this Court expressly recognized that a defendant may not benefit from an amended sentencing provision where the General Assembly has not expressly provided so.

In *Taylor* and *Limoli*, both defendants committed their offenses well after S.B. 2’s effective date of July 1, 1996 (July 23, 2011 and July 16, 2010 respectively). *Taylor* at ¶ 2 and

*Limoli* at ¶ 5. This Court’s conclusion in *Taylor*, “that the determining factor on whether the provisions of H.B. 86 apply to an offender is not the date of the commission of the offense but rather whether the sentence has been imposed,” *Taylor*, ¶ 19, was made to address an issue of law relating to an offender who committed an offense after July 1, 1996, but has been interpreted by the Eighth District to address an issue that was not before this Court.

However, the Eighth District relied on limited portions of both *Taylor* and *Limoli* and did not take into consideration that both cases involved offenders who committed their offenses well after July 1, 1996. *Thomas*, 8<sup>th</sup> Dist. Cuyahoga No. 101202, 2015-Ohio-415, ¶ 46-48. A fair reading of the Eighth District’s decision in *Thomas* is that it determined that Section 5 of S.B. 2 was of no consequence because the General Assembly enacted H.B. 86 with the intent of reducing the state’s prison population. *Thomas*, ¶46, citing *Limoli* at ¶10. In short, the Eighth District determined that Section 5 of S.B. 2 was repealed by implication via the purported goal of enacting H.B. 86.

As a general rule, “repeals by implication are not favored, and the presumption obtains that the legislature in passing a statute did not intended to interfere with or abrogate any former law relating to the same matter unless the [differences] between the two is irreconcilable.” *State ex rel. Fleisher Engineering & Construction Co. v. State Office Building Commission et al.*, 123 Ohio St. 70, 74 174 N.E. 8. The more recent amendments to H.B. 86 are not irreconcilable with S.B. 2’s clear indication that offenses committed prior to July 1, 1996 should be sentenced in accordance with laws that existed at the time of the offense. Therefore, Section 5 of S.B. 2 must be given full effect, and this Court should find that the trial court properly sentenced *Thomas*. Nor should *Taylor* and *Limoli* should be read to eviscerate Section 5 of S.B. 2’s clear mandate that, provisions

of the Revised Code in existence prior to July 1, 1996, apply to an offense committed prior to that date.

**CONCLUSION**

This Court should reverse the decision of the Eighth District Court of Appeals which held that Thomas was serving a void sentence, and remand the matter to the trial court to reinstate the sentence it had originally imposed. The General Assembly has made clear through S.B. 2 that Jermain Thomas is subject to the law in effect at the time of his offense.

Respectfully submitted,

TIMOTHY J. MCGINTY (0024626)  
Cuyahoga County Prosecutor

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**CERTIFICATE OF SERVICE**

A copy of the foregoing has been sent this 21<sup>st</sup> day of December, 2015 to the following via U.S. Mail, Steven L. Taylor, 373 South High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215, Rachel Lipman Curran, 230 E. 9<sup>th</sup> Street, Suite 4000, Cincinnati, Ohio 45202 and Russell Bensing, 1360 E. 9<sup>th</sup> Street, Suite 600, Cleveland, Ohio 44114.

/s/ Daniel T. Van

NO.

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 101202

---

STATE OF OHIO

Plaintiff-Appellant

-vs-

JERMAIN THOMAS

Defendant-Appellee

---

***NOTICE OF APPEAL***

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Counsel for Plaintiff-Appellant

**TIMOTHY J. MCGINTY (0024626)**  
**CUYAHOGA COUNTY PROSECUTOR**

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Counsel for Defendant-Appellee

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**CLEVELAND, OHIO 44113**

**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District in *State v. Jermain Thomas*, 8<sup>th</sup> Dist. Cuyahoga No. 101202, 2015-Ohio-415.

This felony case did not originate in the Court of Appeals, raises a substantial constitutional question and is one of public or great general interest.

Respectfully Submitted,

Timothy J. McGinty  
Cuyahoga County Prosecutor

By: /s/ Daniel T. Van  
Daniel T. Van (#0084614)  
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**SERVICE**

A copy of the foregoing has been sent this 23<sup>rd</sup> day of March, 2015 via U.S. Mail to **RUSSELL S. BENSING, 1370 ONTARIO STREET #1350, CLEVELAND, OHIO 44113** by U.S. Mail and electronically served upon the Ohio Public Defender's Office with Jim Foley (Office of the Ohio Public Defender) at [Jim.Foley@opd.ohio.gov](mailto:Jim.Foley@opd.ohio.gov)

/s/ Daniel T. Van  
Daniel T. Van (#0084614)

FEB. X 5 2015

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101202

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JERMAIN THOMAS**

DEFENDANT-APPELLANT

---

**JUDGMENT:**  
AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-575711-A

**BEFORE:** E.T. Gallagher, J., S. Gallagher, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** February 5, 2015



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FILED AND JOURNALIZED  
PER APP.R. 22(C)

FEB X 5 2015

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By W. J. [Signature] Deputy

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Jermain Thomas (“Thomas”),<sup>1</sup> appeals his rape and kidnaping convictions. We find some merit to the appeal and affirm Thomas’s conviction, but reverse his sentence and remand this case to the trial court for resentencing.

{¶2} On June 27, 2013, Thomas was charged with three counts of rape and one count of kidnaping as a result of conduct he allegedly committed on June 28, 1993. All counts included one- and three-year firearm specifications. Prior to trial, Thomas filed a motion to dismiss the charges, arguing he was prejudiced by the 20-year delay between the alleged incident and the indictment. The trial court denied the motion and the case proceeded to a jury trial.

{¶3} The victim, A.W., testified that on the evening of June 28, 1993, she left her house on Dickens Avenue in Cleveland to walk to her cousin’s house on Manor Avenue, one street over. In the darkness, a man approached her and forced her to walk south on East 97th Street toward Hilgert Drive. The man stayed close behind her holding something into her back that she believed was a gun. They walked up a driveway of a house next to an empty field where the man forced A.W. onto her knees and vaginally raped her. Although it was dark,

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<sup>1</sup> The trial record reflects defendant-appellant’s name has also been spelled “Jermaine,” as indicated in the trial transcript and the parties’ briefs. However, in the record on appeal, his name was spelled “Jermain.” Accordingly, we refer to defendant-appellant as “Jermain Thomas.”

there was sufficient light for A.W. to see that the man was holding a gun. There were no known witnesses of the crime.

{¶4} After the rape, A.W. ran home to use the bathroom before running to a neighbor's house where a friend called the police. Later that evening she went by ambulance to St. Luke's Hospital where Dr. Cynthia Boes ("Dr. Boes") collected evidence of the rape in a rape kit. A.W. described the rape in detail to Dr. Boes, who wrote a narrative account of the incident in A.W.'s chart. A few days after the rape, Officer Debra Simmons ("Simmons") of the Cleveland Police Department met with A.W. in her home to investigate the rape. A.W. was unable to provide a detailed description of the suspect because it was dark, and she did not look at his face at any time during the incident. Without any leads, the case went cold.

{¶5} In 2006, scientists at the Ohio Bureau of Criminal Investigation ("BCI") tested the evidence in A.W.'s rape kit and found DNA that matched Thomas's DNA. A detective contacted A.W. and informed her that BCI had identified a suspect with DNA evidence from the rape kit. A.W. informed the detective that she did not want to prosecute him. She explained she "didn't want to relive that moment again." Accordingly, A.W. signed a "Waiver of Prosecution," and the detective once again closed the investigation.

{¶6} In 2013, an investigator from the Cuyahoga County Prosecutor's Office notified A.W. that the prosecutor's office was proceeding with the prosecution of

the suspect in her rape case. The investigator discussed the incident with A.W. and presented a photograph lineup of suspects. A.W. was unable to identify the perpetrator from the lineup but agreed to assist in the prosecution.

{¶7} At the conclusion of the trial, the jury found Thomas guilty of one count of rape and one count of kidnaping, with the attendant one- and three-year firearm specifications. The court sentenced Thomas to concurrent indefinite prison terms of 8-25 years on the rape and kidnaping convictions, plus three years on the firearm specifications to be served consecutive to the underlying offenses. The trial court also classified Thomas a sexual predator pursuant to H.B. 180. Thomas now appeals and raises five assignments of error.

#### **Preindictment Delay**

{¶8} In the first assignment of error, Thomas argues the trial court erred in denying his motion to dismiss the indictment due to preindictment delay. He contends the delay prejudiced his ability to present a defense.

{¶9} The Due Process Clause of the Fifth Amendment to the United States Constitution, as applicable to the states through the Fourteenth Amendment, provides: "No person shall \* \* \* be deprived of life, liberty, or property, without due process of law." The Ohio Supreme Court has held that "[a]n unjustifiable delay between the commission of an offense and a defendant's indictment therefore, which results in actual prejudice to the defendant, is a violation of the right to due process of law." *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097

(1984), paragraph two of the syllabus. *See also United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

{¶10} Courts apply a two-part test to determine whether preindictment delay constitutes a due process violation. The defendant has the initial burden of showing that he was substantially and actually prejudiced as a result of the delay. *State v. Whiting*, 84 Ohio St.3d 215, 217, 702 N.E.2d 1199 (1998). If the defendant establishes actual prejudice, the burden shifts to the state to produce evidence of a justifiable reason for the delay. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829. Thereafter, the due process inquiry involves a balancing test by the court, weighing the reasons for the delay against the prejudice to the defendant, in light of the length of the delay. *Id.* at ¶ 51.

{¶11} In determining whether a defendant was actually prejudiced by preindictment delay, the court must consider “the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay.” *Id.* at ¶ 51. Prejudice is not presumed solely because there was a lengthy delay, and the defendant may not rely on speculation or vague assertions of prejudice. *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008-Ohio-234, ¶ 13. Proof of actual prejudice must be specific, particularized, and non-speculative. *State v. McFeeture*, 8th Dist. Cuyahoga No. 100434, 2014-Ohio-5271, ¶ 120, quoting *State v. Stricker*, 10th Dist. Franklin No. 03AP-746,

2004-Ohio-3557, ¶ 36. Therefore, in order to establish actual prejudice, the defendant must demonstrate the exculpatory value of the evidence of which he was deprived due to the delay. *Id.*

{¶12} In this case, there was a 20-year delay. Although the delay does not, by itself, establish actual prejudice, Thomas argues there were at least five witnesses who could have provided specific exculpatory information if the case had been prosecuted sooner. First, Thomas contends that Officer Simmons, who investigated the rape and interviewed A.W. in 1993, could have provided exculpatory evidence but she passed away four years before trial. Thomas asserts that Simmons's testimony could have been exculpatory because A.W.'s trial testimony was inconsistent with the statement she gave to Simmons at the time of the rape. A.W. reported to Simmons that the suspect raped her orally, vaginally, and anally, but testified at trial that she only remembered being raped vaginally.

{¶13} However, the discrepancy between A.W.'s statement to Simmons and her trial testimony has no exculpatory value. It is not as if A.W. described a suspect who in no way resembled Thomas, or that A.W. reported something that might suggest she consented to having sex with Thomas. Both of A.W.'s statements were generally consistent, and both statements unequivocally described a rape beside a house adjacent to a vacant lot.

{¶14} Thomas also complains the ambulance driver was never identified, and two neighbors, who observed A.W. immediately after the rape, have since passed away. Thomas also maintains that because Dr. Boes had no independent recollection of her examination of A.W. and relied entirely on A.W.'s medical record for her testimony, Thomas suggests Dr. Boes might have remembered something exculpatory if she had been interviewed closer in time to the rape. However, Thomas fails to explain how his defense would have been helped if Dr. Boes had a more vivid recollection, or if the ambulance driver and neighbors had been available to testify. That these witnesses would have offered exculpatory evidence is purely speculative since Thomas cannot identify any specific evidence they would have provided that might have helped his defense.

{¶15} In this case, Thomas fails to demonstrate how any witness would have helped his defense if the case had been investigated and prosecuted more promptly. Indeed, Thomas practically concedes in his brief that his argument is entirely speculative when he states that he has been "put in the position of having to recreate for the court what might have happened if the trial had occurred promptly," and "we simply don't know what the missing witnesses might have said." (Appellant's brief at 7.) Therefore, because Thomas fails to demonstrate the exculpatory value of the evidence of which he was deprived as a result of the delay, he fails to establish actual prejudice, and the trial court properly denied his motion to dismiss.

{¶16} The first assignment of error is overruled.

### Victim's Hearsay Statement

{¶17} In the second assignment of error, Thomas argues the trial court violated his Sixth Amendment right of confrontation when it allowed Dr. Boes to read the victim's description of the rape as documented in A.W.'s medical records. He contends the statement constituted testimonial hearsay because it described the criminal offense for which he was charged and did not fall under the medical diagnosis and treatment exception to the hearsay rule provided in Evid.R. 803(4).<sup>2</sup>

{¶18} The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right \* \* \* to be confronted with the witnesses against him." Hearsay is an out of court statement offered to prove the truth of the matter asserted. Evid.R. 801(C). Thus, whenever the state seeks to introduce hearsay into evidence in a criminal proceeding, the court must determine not only whether the evidence fits within an exception to the

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<sup>2</sup> Evid.R. 803(4) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

hearsay rule, but also whether the introduction of such evidence offends an accused's right to confront witnesses against him. *State v. Kilbane*, 8th Dist. Cuyahoga No. 99485, 2014-Ohio-1228, ¶ 29.

{¶19} In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Confrontation Clause bars the admission of "testimonial statements of witnesses absent from trial." *Id.* at 59. In *Crawford*, the court explained that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." This means that the state may not introduce "testimonial" hearsay against a criminal defendant, regardless of whether such statements are deemed reliable, unless the defendant has an opportunity to cross-examine the declarant. *Id.* at 53-54, 68.

{¶20} In *Crawford*, the court also held that the Confrontation Clause only requires exclusion of "testimonial" as opposed to "non-testimonial" evidence. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). If a statement is not testimonial, the principles embodied in the Confrontation Clause do not apply. *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

{¶21} Although the *Crawford* court did not specifically define the term “testimonial,” it explained that hearsay statements are implicated by the Confrontation Clause where they are “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford* at 52. Since *Crawford*, there have been questions about whether a victim’s statements to medical personnel as opposed to law enforcement are testimonial. In *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, the Ohio Supreme Court addressed this question and held that an adult rape victim’s hearsay statements to a nurse practitioner during a medical examination were admissible even though the victim was unavailable for cross-examination at trial.

{¶22} In reaching this conclusion, the *Stahl* court adopted the “objective witness test” articulated in *Crawford* and held that

[i]n determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant’s expectations.

*Stahl* at paragraph two of the syllabus. Applying this test, the *Stahl* court determined that the victim’s statements to the nurse were nontestimonial because she “could have reasonably believed that although the examination conducted at the [sexual assault] unit would result in scientific evidence being extracted for prosecution purposes, the statement would be used primarily for

health-care purposes.” *Id.* at ¶ 47. Indeed, the victim had separately provided a statement about the rape to police. Under these circumstances, the court found that the victim’s statements to the medical professional were made for the primary purpose of receiving medical treatment as opposed to investigating past events related to a criminal prosecution. *Id.* at ¶ 25.

{¶23} In *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, the Ohio Supreme Court revisited this question in the context of a child sexual assault. In *Muttart*, the court held that a child victim’s statements to physicians and counselors about how her father sexually abused her were nontestimonial and admissible as evidence because they were made to medical personnel in the course of diagnosis and treatment. The *Muttart* court explained that “[s]tatements made to medical personnel for purposes of diagnosis and treatment are not inadmissible under *Crawford* because they are not even remotely related to the evidence that the Confrontation Clause was designed to avoid.” *Id.* at ¶ 62. See also *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775; *State v. Bowleg*, 8th Dist. Cuyahoga Nos. 100263 and 100264, 2014-Ohio-1422.

{¶24} In this case, A.W. provided the same narrative account of the rape to the police and her medical provider. Dr. Boes testified that medical professionals routinely record the patient’s description of how an injury occurred in addition to the physical findings of a medical examination because they are

relevant to medical diagnosis and treatment. (Tr. 501.) Although Dr. Boes collected DNA evidence during A.W.'s examination for potential prosecution, A.W.'s primary reason for describing the circumstances of the rape to the doctor was for medical treatment rather than investigation. Moreover, because A.W. testified at trial, Thomas was afforded the right to cross-examine her. Therefore, there was no violation of the Confrontation Clause, and the evidence was admissible under the medical diagnosis and treatment exception to the hearsay rule provided in Evid.R. 803(4).

{¶25} The second assignment of error is overruled.

#### **Victim's Prior Inconsistent Statements**

{¶26} In the third assignment of error, Thomas argues the trial court erred in refusing to admit the original police report into evidence. He contends it was admissible for impeachment purposes because it contained a statement from A.W. made to Officer Simmons at the time of the rape that was inconsistent with her trial testimony.

{¶27} A trial court is vested with broad discretion to determine the admissibility of evidence, so long as that discretion is exercised in accordance with the rules of procedure and evidence. *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). We therefore will not disturb the trial court's decision to admit or exclude evidence absent an abuse of discretion. An abuse of discretion connotes an attitude on the part of the court that is unreasonable,

unconscionable, or arbitrary. *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.*, 63 Ohio St.3d 498, 506, 589 N.E.2d 24 (1992).

{¶28} Pursuant to Evid.R. 613(B), a party may introduce extrinsic evidence of a witness's prior inconsistent statement to impeach his or her credibility. However, when extrinsic evidence of a prior inconsistent statement is offered into evidence pursuant to Evid.R. 613(B), the proponent of the evidence must lay a foundation through direct or cross-examination in which (1) the witness is presented with the former statement, (2) the witness is asked whether she made the statement, (3) the witness is given an opportunity to admit, deny, or explain the statement, and (4) the opposing party is given an opportunity to interrogate the witness on the inconsistent statement. *State v. Mack*, 73 Ohio St.3d 502, 515, 653 N.E.2d 329 (1995).

{¶29} When presenting the prior inconsistent statement, counsel is not required to show the prior statement or disclose its contents to the witness at the time he or she is interrogating the witness. Evid.R. 613(A); *State v. McQueen*, 8th Dist. Cuyahoga No. 44990, 1983 Ohio App. LEXIS 13740, fn. 6 (Feb. 3, 1983). If a witness denies making the statement, extrinsic evidence of the statement is generally admissible if it relates to "a fact of consequence to the determination of the action." Evid.R. 613(B)(2)(a); *State v. McKinney*, 8th Dist. Cuyahoga No. 99270, 2013-Ohio-5730, ¶ 14. A statement that the witness "does not remember" is equivalent to a denial for purposes of establishing the requisite foundation for

impeachment of a witness with a prior statement. *State v. Wilbon*, 8th Dist. Cuyahoga No. 82934, 2004-Ohio-1784, ¶ 26.

{¶30} In this case, A.W. testified at trial that the suspect raped her vaginally, but denied that he raped her anally or orally. Thomas sought to impeach A.W.'s testimony with evidence of a prior inconsistent statement contained in the police report in which she told Officer Simmons that she had been raped vaginally, orally, and anally. In an attempt to lay the required foundation, Thomas's trial counsel questioned A.W. as follows:

Q. Do you recall telling an officer that you unwillingly gave oral sex to the suspect and the suspect ejaculated in your mouth? Do you recall that?

A: No.

Q: Do you recall telling an officer that the suspect forced the victim on her back and had vaginal sex with the victim and ejaculated in the victim's vagina?

A: No.

Q: And do you recall telling the same officer the suspect turned the victim over and had rectal intercourse with the victim and the suspect ejaculated in the victim's rectum?

A: No.

(Tr. 708.) Thus, Thomas's trial counsel presented A.W. with the prior statements by asking her if she made such prior statements to police. Counsel also gave her an opportunity to admit or deny the statements. And since the state had the opportunity to question A.W. about the statement on redirect

examination, all the necessary elements of the foundation were laid, and the police report should have been admitted into evidence for purposes of impeachment.

{¶31} Nevertheless, the trial court's error in refusing to admit the police report into evidence was harmless. A criminal defendant has a constitutional right to a trial free from prejudicial error but not necessarily a trial free of all error. *State v. Brown*, 65 Ohio St.3d 483, 485, 605 N.E.2d 46 (1992). Crim.R. 52(A) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." An error does not affect substantial rights if there is no reasonable probability that the error contributed to the defendant's conviction. *Brown* at 485. In the harmless error analysis, the state has the burden of proving that the error did not affect the substantial rights of the defendant. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15.

{¶32} Thomas sought to introduce the police report to impeach A.W. Although lack of memory constitutes a denial for purposes of laying the foundation, A.W.'s testimony did not contradict the statement she gave police 20 years earlier. She testified that she did not remember making the prior statement, not that she never made the statement. Therefore, even if the police report had been admitted into evidence it would not have made A.W. any less credible.

{¶33} A.W.'s testimony that she was vaginally raped was consistent with her statement to Officer Simmons. Thomas was only convicted of vaginal rape; the jury acquitted him on the counts of oral and anal rape. Moreover, evidence of other prior statements corroborated A.W.'s trial testimony that she had never seen Thomas before the rape and did not see him after the rape until the time of trial. Yet, BCI discovered Thomas's DNA in A.W.'s rape kit. The only reasonable explanation for the presence of Thomas's DNA in the rape kit is that he raped A.W. Accordingly, we find the court's refusal to admit the police report into evidence was harmless beyond a reasonable doubt.

{¶34} The third assignment of error is overruled.

### **Mistrial**

{¶35} In the fourth assignment of error, Thomas argues the trial court erred in denying his motion for a mistrial. Thomas claims he was unfairly prejudiced by the prosecutor's improper interrogation of a BCI supervisor regarding his practice of testing DNA on behalf of defendants in some cases but not in this case. Thomas contends the prosecutor improperly placed the burden of proof on the defense.

{¶36} The decision to grant or deny a mistrial lies within the sound discretion of the trial court. *State v. Garner*, 74 Ohio St.3d 49, 656 N.E.2d 623 (1995). An appellate court will not disturb the exercise of that discretion absent a showing that the accused has suffered material prejudice. *State v. Sage*, 31

Ohio St.3d 173, 510 N.E.2d 343 (1987). A mistrial should be declared only when the ends of justice so require and "a fair trial is no longer possible." *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). Further, to warrant a mistrial as a result of prosecutorial misconduct, the defendant must show there is a reasonable probability that but for the prosecutor's misconduct, the outcome of the proceeding would have been different. *State v. Loza*, 71 Ohio St.3d 61, 78, 641 N.E.2d 1082 (1994).

{¶37} Thomas argues the following line of questioning by the prosecutor improperly shifted the burden of proof to the defense:

Q: Other than getting calls from the submitting agency, in your tenure at BCI have you ever been called upon by a defense attorney for testing in a case?

A: Yes, I have. We've been called from submitting agencies, law enforcement, prosecutor's office, and I have been called from the defense. I take down a request. I do a consult obviously with law enforcement and the prosecution [sic] office and then when an agreement has been made between them and the courts we will do testing if necessary.

Q: And have you ever had the occasion to send items out from BCI to another laboratory for testing at the request of a defense attorney?

A: Yes. In our DNA reports we have a remarks section that says we save samples for independent testing. If they wish, they can send it out, or they can decide just to send it out to a third party and not have BCI do it at all. And that has been the case in the past before.

Q: Was that the case with this particular matter?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q: Was that the case with this matter?

A: This case was just sent on to DNA and DNA was performed. No calls were made as to who would do the DNA analysis.

{¶38} Despite Thomas's argument to the contrary, these questions did not shift the burden of proof to the defense. The witness's responses to these questions demonstrated that BCI is an independent agency that consults with both prosecutors and defendants. The questions were likely intended to dispel any perceptions of bias the jury may have had if they thought BCI worked exclusively for the government.

{¶39} In its charge, the court explained to the jury that Thomas is presumed innocent until the state proves him guilty beyond a reasonable doubt. The court further explained that the state bears this burden of proof. A jury is presumed to follow the instructions given to it by a trial judge. *State v. Loza*, 71 Ohio St.3d at 78-79, 641 N.E.2d 1082. We find nothing in the record that placed the burden of proof on Thomas.

{¶40} According, the fourth assignment of error is overruled.

### Sentencing

{¶41} In the fifth assignment of error, Thomas argues the trial court erred in sentencing him to an indefinite prison terms of 8-25 years under the sentencing provisions in effect at the time the rape and kidnaping were

committed. Thomas contends that although the rape and kidnaping offenses were committed in 1993, he should have been sentenced under Am.Sub.H.B. 86 ("H.B. 86"), which became effective on September 30, 2011. The state, on the other hand, contends that H.B. 86 is an extension of Am.Sub. S.B. 2 ("S.B. 2") and only applies to offenses committed on or after July 1, 1996. Therefore, the state argues, Thomas's rape and kidnaping offenses, which were committed in 1993, are not subject to the sentencing amendments in H.B. 86.

{¶42} Section 5 of S.B. 2 states:

The provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and, NOTWITHSTANDING DIVISION (B) OF SECTION 1.58 OF THE REVISED CODE, to a person upon whom a court on or after that date and in accordance with the law in existence prior to that date, IMPOSES a term of imprisonment for an offense that was committed prior to that date. (Emphasis sic.)

Thus, in S.B. 2 the General Assembly specifically declared that all defendants who committed crimes on or before July 1, 1996 had to be sentenced under the law in existence at the time of the offense, "notwithstanding division (B) of section 1.58 of the Revised Code." Section 3, Am.Sub.S.B. No. 269, 146 Ohio Laws, Part IV, 11099, amending Section 5 of S.B. 2. *See State v. Rush*, 83 Ohio St.3d 53, 697 N.E.2d 634 (1998).

{¶43} However, H.B. 86 does not incorporate this exclusionary language.

On the contrary, Sections 3 and 4 of the act expressly provide that certain

specified offenses and certain sentencing provisions are subject to H.B. 86 sentencing amendments even though the subject offenses were committed prior to its effective date. As relevant here, Section 4 states, in relevant part:

SECTION 4. The amendments to \* \* \* division (A) of section 2929.14 of the Revised Code that are made in this act apply to a person penalized \* \* \* under th[at] section[] on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.

{¶44} Division (A) of R.C. 2929.14, which governs basic prison terms, states in relevant part:

[I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years.

Thomas was convicted of rape in violation of R.C. 2907.02(A)(2) and kidnaping in violation of R.C. 2905.01(A)(4). Both offenses are first-degree felonies. Pursuant to R.C. 2929.14(A), as amended by H.B. 86, the trial court was required to impose a definite prison term of "three, four, five, six, seven, eight, nine, ten, or eleven years," for first-degree felonies. Section 4 of H.B. 86 specifically states that the basic prison terms outlined in R.C. 2929.14(A), as amended by the act, apply to a person who is penalized under that section.

{¶45} In contrast to Section 5 of S.B. 2, which excluded application of R.C. 1.58(B) from its provisions, Section 4 of H.B. 86 expressly states that H.B. 86

amendments apply “to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” R.C. 1.58(B) states:

If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

{¶46} These provisions are consistent with the legislative intent behind H.B. 86. In *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641, the Ohio Supreme Court examined the effect of H.B. 86 on a defendant who was convicted of an offense specified in Section 3 of H.B. 86 prior to its effective date but was not sentenced until after its effective date. The specified offense was possession of crack cocaine in violation of R.C. 2925.11. The court noted that Section 3 of H.B. 86, which is very similar to Section 4, specifically identified R.C. 2925.11 and stated that R.C. 1.58(B) makes the amendments to that code section applicable. Therefore, the *Limoli* court concluded that individuals who possessed crack cocaine in violation of R.C. 2925.11 prior to H.B. 86’s effective date, but are penalized after its effective date, must be sentenced under the H.B. 86 amendments. Regarding the legislature’s intent, the Supreme Court explained:

The goal of the General Assembly in enacting H.B. 86 was “to reduce the state’s prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison.” [*State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612 at ¶ 17, citing Ohio Legislative Service Commission, Fiscal Note & Local Impact Statement to Am.Sub.H.B. 86, at 3 (Sept. 30, 2011)].

*Limoli* at ¶ 10.

{¶47} Although neither Section 3 nor Section 4 specify that rape and kidnaping are offenses covered by H.B. 86, Section 4 states that H.B. 86 amendments apply to defendants penalized under R.C. 2929.14(A). Moreover, H.B. 86 expressly states that where its sentencing provisions provide a more lenient sentence than previous sentencing statutes, then R.C. 1.58(B) makes the H.B. 86 amendments applicable. *See* Sections 3 and 4 of H.B. 86.

{¶48} As previously stated, R.C. 2929.14(A)(1), as amended by H.B. 86, states that the basic prison term for a first-degree felony “shall be three, four, five, six, seven, eight, nine, ten, or eleven years.” Yet, the trial court sentenced Thomas to an indefinite term of 8 to 25 years pursuant to the sentencing provisions in effect in 1993, when the offense was committed. The maximum prison term Thomas could receive for rape under R.C. 2929.14(A)(1) as amended by H.B. 86 is only 11 years, whereas the maximum the trial court imposed under pre-S.B. 2 sentencing laws was 25 years. Section 4 provides that Thomas is entitled to the more lenient sentencing provisions of H.B. 86 by virtue of R.C. 1.58(B). Therefore, the indefinite prison sentence was not authorized by law and violated Section 4 of H.B. 86.

{¶49} In *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, the Ohio Supreme Court held that “sentences that do not comport with mandatory provisions are subject to total resentencing.” *Id.* at ¶ 20, citing *State*

*v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 11.

Unauthorized sentences are illegal and void ab initio. *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984). Therefore, Thomas's indefinite sentences are void and must be vacated.

{¶50} The fifth assignment of error is sustained.

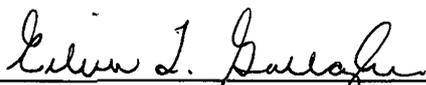
{¶51} Judgment affirmed in part, reversed in part, and remanded to the trial court for resentencing under H.B. 86.

It is ordered that appellant and appellee share the costs taxed herein.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



EILEEN T. GALLAGHER, JUDGE

SEAN C. GALLAGHER, P.J., and  
PATRICIA ANN BLACKMON, J., CONCUR

The State of Ohio, }  
Cuyahoga County. } ss.

I, [REDACTED] Clerk of the Court of

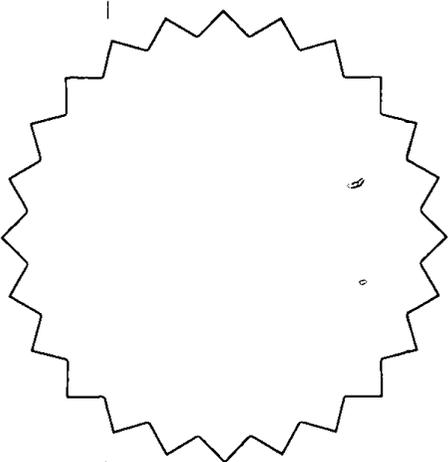
Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal dated 2/5/15 CA 101202

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal dated 2/5/15 CA 101202 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 5<sup>th</sup> day of February A.D. 20 15

[REDACTED], Clerk of Courts

By W. Roth Deputy Clerk



## [ORC Ann. 1.58](#)

Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 31 (HB 244).

[Page's Ohio Revised Code Annotated](#) > [Ohio Revised Code General Provisions](#) > [Chapter 1: Definitions; Rules of Construction](#) > [Construction](#)

### **§ 1.58 Effect of reenactment, amendment, or repeal.**

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- (A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
- (1) Affect the prior operation of the statute or any prior action taken thereunder;
  - (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;
  - (3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;
  - (4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.
- (B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

### **History**

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134 v H 607. Eff 1-3-72.

Page's Ohio Revised Code Annotated

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## [ORC Ann. 2907.02](#)

Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 31 (HB 244).

[Page's Ohio Revised Code Annotated](#) > [Title 29: Crimes — Procedure](#) > [Chapter 2907: Sex Offenses](#) > [Sexual Assaults](#)

### § 2907.02 Rape.

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(A)

- (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
  - (a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.
  - (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.
  - (c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.
- (2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in [section 3719.41 of the Revised Code](#) to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in [section 2929.14 of the Revised Code](#) that is not less than five years. Except as otherwise provided in this division, notwithstanding [sections 2929.11 to 2929.14 of the Revised Code](#), an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to [section 2971.03 of the Revised Code](#). If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to [section 2971.03 of the Revised Code](#), and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to [section 2971.03 of the Revised Code](#), the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of [section 2971.03 of the Revised Code](#) applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

- (C) A victim need not prove physical resistance to the offender in prosecutions under this section.
- (D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under [section 2945.59 of the Revised Code](#), and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

- (E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.
- (F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.
- (G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

## History

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134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 139 v S 199 (Eff 7-1-83); 141 v H 475 (Eff 3-7-86); [145 v S 31](#) (Eff 9-27-93); [146 v S 2](#) (Eff 7-1-96); [147 v H 32](#) (Eff 3-10-98); [149 v H 485](#). Eff 6-13-2002; [151 v S 260](#), § 1, eff. 1-2-07; [152 v S 10](#), § 1, eff. 1-1-08.

Page's Ohio Revised Code Annotated

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**§ 2907.02 Rape.**

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- (A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
- (a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.
  - (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.
  - (c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.
- (2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.
- (B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.
- (C) A victim need not prove physical resistance to the offender in prosecutions under this section.
- (D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.
- Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.
- (E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.
- (F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.
- (G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

## History

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134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 139 v S 199 (Eff 7-1-83); 141 v H 475 (Eff 3-7-86); 145 v S 31. Eff 9-27-93.

Not analogous to former RC § 2907.02 (RS § 6831; S&C 406; S&S 267, 268; 33 v 33; 60 v 85; 66 v 122; 83 v 81; 86 v 3; GC § 12433; 113 v 541; Bureau of Code Revision, 10-1-53; 131 v 673), repealed 134 v H 511, § 2, eff 1-1-74.

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## 1996 ORC Ann. 2929.11

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### PAGE'S OHIO REVISED CODE ANNOTATED; > TITLE XXIX [29] CRIMES--PROCEDURE > CHAPTER 2929: PENALTIES AND SENTENCING

#### **§ 2929.11 Penalties for felony.**

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(A) Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder, except as provided in division (D), (E), or (H) of this section or section 2929.23 of the Revised Code, shall be imprisoned for an indefinite term and, in addition, may be fined or required to make restitution, or both. The indefinite term of imprisonment shall consist of a maximum term as provided in this section and a minimum term fixed by the court as provided in this section. The fine and restitution shall be fixed by the court as provided in this section.

Whoever is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a felony violation of section 2909.02 or 2909.03 of the Revised Code and is sentenced to an indefinite term of imprisonment shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

(B) Except as provided in division (D) or (H) of this section, sections 2929.71 and 2929.72, and Chapter 2925 of the Revised Code, terms of imprisonment for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty-five years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of ten, eleven, twelve, thirteen, fourteen, or fifteen years, and the maximum term shall be twenty-five years;

(2) For an aggravated felony of the second degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be three, four, five, six, seven, or eight years, and the maximum term shall be fifteen years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of eight, nine, ten, eleven, or twelve years, and the maximum term shall be fifteen years;

(3) For an aggravated felony of the third degree:

- (a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;
  - (b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of five, six, seven, or eight years, and the maximum term shall be ten years;
- (4) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;
  - (5) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years;
  - (6) For a felony of the third degree, the minimum term shall be two years, thirty months, three years, or four years, and the maximum term shall be ten years;
  - (7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.
- (C) Fines for felony shall be imposed as follows:
- (1) For an aggravated felony of the first degree or a felony of the first degree, not more than ten thousand dollars;
  - (2) For an aggravated felony of the second degree or a felony of the second degree, not more than seven thousand five hundred dollars;
  - (3) For an aggravated felony of the third degree or a felony of the third degree, not more than five thousand dollars;
  - (4) For a felony of the fourth degree, not more than two thousand five hundred dollars.
- (D) Whoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person or make an actual threat of physical harm to any person with a deadly weapon, as defined in section 2923.11 of the Revised Code, and who has not previously been convicted of an offense of violence shall be imprisoned for a definite term, and, in addition, may be fined or required to make restitution. The restitution shall be fixed by the court as provided in this section. If a person is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a violation of section 2909.03 of the Revised Code that is a felony of the third or fourth degree and is sentenced pursuant to this division, he shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

The terms of imprisonment shall be imposed as follows:

- (1) For a felony of the third degree, the term shall be one, one and one-half, or two years;
  - (2) For a felony of the fourth degree, the term shall be six months, one year, or eighteen months.
- (E) The court shall require a person who is convicted of or pleads guilty to a violation of section 2921.41 of the Revised Code, in the circumstances described in division (C)(2)(a) of that section, to make restitution for all of the property that is the subject of the offense, in accordance with division (C)(2) of that section. The court shall require, if appropriate, a person who is convicted of or pleads guilty to arson under section 2909.03

or to aggravated arson under section 2909.02 of the Revised Code to make restitution for all or part of the property damage that is caused by his offense, which restitution shall be in addition to the penalties otherwise imposed by the court for a conviction or plea of guilty for arson or aggravated arson. The court, in any other case, may require a person who is convicted of or pleads guilty to a felony to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed. If the court determines that the victim of the offense was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the offense, the court shall, regardless of whether the offender knew the age of the victim, consider this fact in favor of imposing restitution, but this fact shall not control the decision of the court.

- (F)** No person shall be sentenced for an offense pursuant to division (B)(1)(b), (2)(b), or (3)(b) of this section because the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.142 [2941.14.2] of the Revised Code.
- (G)** No person shall be sentenced pursuant to division (B)(6) or (7) of this section to an indefinite term of imprisonment for a felony of the third or fourth degree unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.143 [2941.14.3] of the Revised Code.
- (H)** A person who has been convicted of or pleaded guilty to a felony of the third or fourth degree and who is an eligible offender may be permitted by the department of rehabilitation and correction to serve his term of imprisonment imposed for the offense under this section, under any section contained in Chapter 2925 of the Revised Code, or under any other provision of the Revised Code, as a sentence of shock incarceration, in accordance with section 5120.031 [5120.03.1] of the Revised Code. As used in this division, "eligible offender" and "shock incarceration" have the same meanings as in section 5120.031 [5120.03.1] of the Revised Code.

## History

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134 v H 511 (Eff 1-1-74); 137 v S 119 (Eff 8-30-78); 139 v S 199 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 140 v H 265 (Eff 9-20-84); 140 v S 4 (Eff 9-26-84); 141 v H 284 (Eff 3-6-86); 143 v H 51 (Eff 11-8-90); 143 v S 258. Eff 11-20-90.

The effective date is set by section 15 of SB 258.

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## 2014 ORC Ann. 2929.14

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### **§ 2929.14 Basic prison terms.**

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- (A) Except as provided in division (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), (B)(6), (B)(7), (B)(8), (E), (G), (H), or (J) of this section or in division (D)(6) of [section 2919.25 of the Revised Code](#) and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:
- (1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years.
  - (2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.
  - (3)
    - (a) For a felony of the third degree that is a violation of [section 2903.06](#), [2903.08](#), [2907.03](#), [2907.04](#), or [2907.05 of the Revised Code](#) or that is a violation of [section 2911.02](#) or [2911.12 of the Revised Code](#) if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of [section 2911.01](#), [2911.02](#), [2911.11](#), or [2911.12 of the Revised Code](#), the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.
    - (b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.
  - (4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.
  - (5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.
- (B) (1) (a) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in [section 2941.141](#), [2941.144](#), or [2941.145 of the Revised Code](#), the court shall impose on the offender one of the following prison terms:
- (i) A prison term of six years if the specification is of the type described in [section 2941.144 of the Revised Code](#) that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or suppressor on or about the offender's person or under the offender's control while committing the felony;
  - (ii) A prison term of three years if the specification is of the type described in [section 2941.145 of the Revised Code](#) that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;
  - (iii) A prison term of one year if the specification is of the type described in [section 2941.141 of the Revised Code](#) that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

- (b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2967.19, section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.
- (c) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of [section 2923.161 of the Revised Code](#) or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in [section 2941.146 of the Revised Code](#) that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of [section 2923.161 of the Revised Code](#) or for the other felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (B)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (B)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (B)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.
- (d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in [section 2941.1411 of the Revised Code](#) that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed, subject to divisions (C) to (I) of [section 2967.19 of the Revised Code](#), shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (B)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (B)(1)(d) of this section.
- (e) The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of [section 2923.12](#) or [2923.123 of the Revised Code](#). The court shall not impose any of the prison terms described in division (B)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 that involves a deadly weapon that is a firearm other than a dangerous ordnance, [section 2923.16](#), or [section 2923.121 of the Revised Code](#). The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of [section 2923.13 of the Revised Code](#) unless all of the following apply:
- (i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.
  - (ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.
- (f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in [section 2941.1412 of the Revised Code](#) that charges the

offender with committing the offense by discharging a firearm at a peace officer as defined in [section 2935.01 of the Revised Code](#) or a corrections officer, as defined in [section 2941.1412 of the Revised Code](#), the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (B)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (B)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (B)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2) (a) If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in [section 2941.149 of the Revised Code](#) that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under [section 2929.12 of the Revised Code](#) indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are demeaning to the seriousness of the offense,

because one or more of the factors under [section 2929.12 of the Revised Code](#) indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in [section 2941.149 of the Revised Code](#) that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of [section 2929.01 of the Revised Code](#), including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (B)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (B)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (B)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) Except when an offender commits a violation of [section 2903.01](#) or [2907.02 of the Revised Code](#) and the penalty imposed for the violation is life imprisonment or commits a violation of [section 2903.02 of the Revised Code](#), if the offender commits a violation of [section 2925.03](#) or [2925.11 of the Revised Code](#) and that section classifies the offender as a major drug offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of [section 4729.54 of the Revised Code](#) that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in [section 2941.1410 of the Revised Code](#) charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of [section 2907.02 of the Revised Code](#) and, had the offender completed the violation of [section](#)

[2907.02 of the Revised Code](#) that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of [section 2907.02 of the Revised Code](#), the court shall impose upon the offender for the felony violation a mandatory prison term of the maximum prison term prescribed for a felony of the first degree that, subject to divisions (C) to (I) of [section 2967.19 of the Revised Code](#), cannot be reduced pursuant to section 2929.20, section 2967.19, or any other provision of Chapter 2967. or 5120. of the Revised Code.

- (4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of [section 2929.13 of the Revised Code](#), the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (B)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (B)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (B)(4) of this section, the court also may sentence the offender to a community control sanction under [section 2929.16](#) or [2929.17 of the Revised Code](#), but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of [section 2929.13 of the Revised Code](#) and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

- (5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of [section 2903.06 of the Revised Code](#) and also is convicted of or pleads guilty to a specification of the type described in [section 2941.1414 of the Revised Code](#) that charges that the victim of the offense is a peace officer, as defined in [section 2935.01 of the Revised Code](#), or an investigator of the bureau of criminal identification and investigation, as defined in [section 2903.11 of the Revised Code](#), the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (B)(5) of this section, the prison term, subject to divisions (C) to (I) of [section 2967.19 of the Revised Code](#), shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(5) of this section for felonies committed as part of the same act.
- (6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of [section 2903.06 of the Revised Code](#) and also is convicted of or pleads guilty to a specification of the type described in [section 2941.1415 of the Revised Code](#) that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of [section 4511.19 of the Revised Code](#) or an equivalent offense, as defined in [section 2941.1415 of the Revised Code](#), or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term

on an offender under division (B)(6) of this section, the prison term, subject to divisions (C) to (I) of [section 2967.19 of the Revised Code](#), shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(6) of this section for felonies committed as part of the same act.

- (7) (a)** If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of [section 2919.22 of the Revised Code](#) and also is convicted of or pleads guilty to a specification of the type described in [section 2941.1422 of the Revised Code](#) that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

**(i)** If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

**(ii)** If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of [section 2929.14 of the Revised Code](#);

**(iii)** If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of [section 2929.14 of the Revised Code](#).

- (b)** Subject to divisions (C) to (I) of [section 2967.19 of the Revised Code](#), the prison term imposed under division (B)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

- (8)** If an offender is convicted of or pleads guilty to a felony violation of [section 2903.11](#), [2903.12](#), or [2903.13 of the Revised Code](#) and also is convicted of or pleads guilty to a specification of the type described in [section 2941.1423 of the Revised Code](#) that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in [section 2929.14 of the Revised Code](#) for felonies of the same degree as the violation.

- (C) (1) (a)** Subject to division (C)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (B)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

- (b)** If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (B)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any

other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

- (c) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.
- (d) If a mandatory prison term is imposed upon an offender pursuant to division (B)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.
  - (2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates [section 2917.02](#), [2917.03](#), or [2921.35 of the Revised Code](#) or division (A)(1) or (2) of [section 2921.34 of the Revised Code](#), if an offender who is under detention at a detention facility commits a felony violation of [section 2923.131 of the Revised Code](#), or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of division (A)(1) or (2) of [section 2921.34 of the Revised Code](#), any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.
  - (3) If a prison term is imposed for a violation of division (B) of [section 2911.01 of the Revised Code](#), a violation of division (A) of [section 2913.02 of the Revised Code](#) in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of [section 2921.331 of the Revised Code](#), the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.
  - (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
    - (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to [section 2929.16](#), [2929.17](#), or [2929.18 of the Revised Code](#), or was under post-release control for a prior offense.
    - (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
    - (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.
  - (5) If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of [section 2903.06 of the Revised Code](#) pursuant to division (A) of this section or [section 2929.142 of the Revised Code](#). If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (B)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term

imposed pursuant to division (B)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (B)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of [section 2903.06 of the Revised Code](#) pursuant to division (A) of this section or [section 2929.142 of the Revised Code](#).

- (6) When consecutive prison terms are imposed pursuant to division (C)(1), (2), (3), (4), or (5) or division (H)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

(D)

- (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of [section 2967.28 of the Revised Code](#). [Section 2929.191 of the Revised Code](#) applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.
- (2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (D)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. [Section 2929.191 of the Revised Code](#) applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

- (E) The court shall impose sentence upon the offender in accordance with [section 2971.03 of the Revised Code](#), and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

- (1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.
- (2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of [section 2907.02 of the Revised Code](#) committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of [section 2907.02 of the Revised Code](#), or division (B) of [section 2907.02 of the Revised Code](#) provides that the court shall not sentence the offender pursuant to [section 2971.03 of the Revised Code](#).
- (3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in [section 2941.1418](#), [2941.1419](#), or [2941.1420 of the Revised Code](#).
- (4) A person is convicted of or pleads guilty to a violation of [section 2905.01 of the Revised Code](#) committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to [section 2971.03 of the Revised Code](#).
- (5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b),

(D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of [section 2929.06 of the Revised Code](#) requires the court to sentence the offender pursuant to division (B)(3) of [section 2971.03 of the Revised Code](#).

- (6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of [section 2929.02 of the Revised Code](#) requires the court to sentence the offender pursuant to [section 2971.03 of the Revised Code](#).
- (F) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the [Revised Code](#), [section 2929.142](#) of the [Revised Code](#), [section 2971.03](#) of the Revised Code, or any other provision of law, [section 5120.163 of the Revised Code](#) applies regarding the person while the person is confined in a state correctional institution.
- (G) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in [section 2941.142 of the Revised Code](#) that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.
- (H)
- (1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in [section 2941.143 of the Revised Code](#) that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.
- (2) (a) If an offender is convicted of or pleads guilty to a felony violation of [section 2907.22](#), [2907.24](#), [2907.241](#), or [2907.25 of the Revised Code](#) and to a specification of the type described in [section 2941.1421 of the Revised Code](#) and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:
- (i) Subject to division (H)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;
- (ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of [section 2907.22](#), [2907.23](#), [2907.24](#), [2907.241](#), or [2907.25 of the Revised Code](#) and also was convicted of or pleaded guilty to a specification of the type described in [section 2941.1421 of the Revised Code](#) regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.
- (b) In lieu of imposing an additional prison term under division (H)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (H)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of [section 2907.22](#), [2907.24](#), [2907.241](#), or [2907.25 of the Revised Code](#) and any residential sanction imposed for the violation under [section 2929.16 of the Revised Code](#). A sanction imposed under this division shall be considered to be a community control sanction for purposes of [section 2929.15 of the Revised Code](#), and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender

shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

- (I) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under [section 5120.031 of the Revised Code](#) or for placement in an intensive program prison under [section 5120.032 of the Revised Code](#), disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in [section 5120.031](#) or [5120.032 of the Revised Code](#), whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in [section 5120.031](#) or [5120.032 of the Revised Code](#), whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in [section 5120.031](#) or [5120.032 of the Revised Code](#) and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

- (J) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of [section 2903.06 of the Revised Code](#) and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to [section 2929.142 of the Revised Code](#).

## History

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[146 v S 2](#) (Eff 7-1-96); [146 v S 269](#) (Eff 7-1-96); [146 v H 88](#) (Eff 9-3-96); [146 v H 445](#) (Eff 9-3-96); [146 v H 154](#) (Eff 10-4-96); [146 v S 166](#) (Eff 10-17-96); [146 v H 180](#) (Eff 1-1-97); [147 v H 151](#) (Eff 9-16-97); [147 v H 32](#) (Eff 3-10-98); [147 v S 111](#) (Eff 3-17-98); [147 v H 2](#) (Eff 1-1-99); [148 v S 1](#) (Eff 8-6-99); [148 v H 29](#) (Eff 10-29-99); [148 v S 107](#) (Eff 3-23-2000); [148 v S 22](#) (Eff 5-17-2000); [148 v S 222](#) (Eff 3-22-2001); [149 v H 485](#) (Eff 6-13-2002); [149 v H 327](#) (Eff 7-8-2002); [149 v H 130](#), Eff 4-7-2003; [149 v S 123](#), § 1, eff. 1-1-04; [150 v H 12](#), §§ 1, 3, eff. 4-8-04+; [150 v H 52](#), § 1, eff. 6-1-04; [150 v H 163](#), § 1, eff. 9-23-04; [150 v H 473](#), § 1, eff. 4-29-05; [151 v H 95](#), § 1, eff. 8-3-06; [151 v H 137](#), § 1, eff. 7-11-06; [151 v H 137](#), § 3, eff. 8-3-06; [151 v S 260](#), § 1, eff. 1-2-07; [151 v S 281](#), § 1, eff. 1-4-07; [151 v H 461](#), § 1, eff. 4-4-07; [152 v S 10](#), § 1, eff. 1-1-08; [152 v S 184](#), § 1, eff. 9-9-08; [152 v S 220](#), § 1, eff. 9-30-08; [152 v H 280](#), § 1, eff. 4-7-09; [152 v H 130](#), § 1, eff. 4-7-09; [2011 HB 86](#), § 1, eff. Sept. 30, 2011; [2012 SB 337, § 1](#), eff. Sept. 28, 2012; [2014 HB 234, § 1](#), effective March 23, 2015.